



International Covenant on Civil and Political Rights

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Human Rights Committee

Communication No. 1985/2010

Views adopted by the Committee at its 111th session (7–25 July 2014)

<i>Submitted by:</i>	Marina Kocktish (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	4 May 2010 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 27 September 2010 (not issued in document form)
<i>Date of adoption of Views:</i>	24 July 2014
<i>Substantive issues:</i>	Freedom of expression; access to court; equality before the law; non-discrimination
<i>Procedural issues:</i>	Exhaustion of domestic remedies; substantiation of claims
<i>Articles of the Covenant:</i>	14 (para. 1), 19 read separately and in conjunction with 2 (para. 3) and 26
<i>Articles of the Optional Protocol:</i>	2 and 5 (para. 2 (b))

* Reissued for technical reasons on 3 November 2014.

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Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (111th session)

concerning

Communication No. 1985/2010*

Submitted by: Marina Kocktish (not represented by counsel)
Alleged victim: The author
State party: Belarus
Date of communication: 4 May 2010 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 24 July 2014,

Having concluded its consideration of communication No. 1985/2010, submitted to the Human Rights Committee by Marina Kocktish under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author is Marina Kocktish, a Belarusian national, born in 1977. She claims to be a victim of a violation by Belarus of her rights under article 14, paragraph 1; article 19 read separately and in conjunction with article 2, paragraph 3; and article 26 of the International Covenant on Civil and Political Rights.¹ The author is unrepresented.

The facts as submitted by the author

2.1 The author is a journalist for the independent newspaper *Narodnaya Volya*. On 26 November 2008, the editor-in-chief of the newspaper submitted a request for the author's accreditation to the State party's National Assembly in order to enable her to report on the work of the House of Representatives. On 31 December 2008, the deputy head of the secretariat of the House of Representatives informed the editor-in-chief that the request had been forwarded to the security service responsible for granting access to the premises of the

*The following members of the Committee participated in the consideration of the present communication: Yadh Ben Achour, Lazhari Bouzid, Cornelis Flinterman, Yuji Iwasawa, Walter Kälin, Zonke Zanele Majodina, Gerald L. Neuman, Sir Nigel Rodley, Víctor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Dheerujall B. Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili, Margo Waterval and Andrei Paul Zlătescu.

¹ The Optional Protocol entered into force for Belarus on 30 December 1992.

Sovetskaya 11 administrative complex, where the National Assembly is located, but that it had refused to grant access to the author. The author submits that no explanation was provided for the refusal, nor did the response mention the possibility of appeal.

2.2 On 9 January 2009, the editor-in-chief again requested accreditation for the author, on that occasion writing to the President of the House of Representatives. On 23 January 2009, the Committee on Human Rights, National Matters and Mass Media of the House of Representatives replied that the accreditation request had been reviewed in accordance with the Law on the Press and Other Mass Media and the Rules of Accreditation for Journalists from the Mass Media to the House of Representatives of Belarus. According to rule No. 11, a journalist who is refused access to the Sovetskaya 11 administrative complex is not eligible for accreditation. The editor-in-chief was also informed that he could submit a request for accreditation for another journalist from the newspaper and that the author could ask for accreditation for National Assembly events taking place outside the Sovetskaya 11 administrative complex.

2.3 On 10 February 2009, the author and the editor-in-chief of the newspaper brought a complaint before the Moscow District Court in Minsk concerning the refusal to grant accreditation. The complaint referred, *inter alia*, to article 34, paragraph 1, of the Constitution of Belarus, which guarantees the right of citizens to obtain, keep and disseminate full, reliable and timely information regarding the activities of State institutions. Under paragraph 3 of that article, access to information can only be limited by law in order to protect the honour and dignity of others, the personal and family life of citizens and the full realization of their rights. Article 42 of the Law on the Press and Other Mass Media, which regulates the accreditation procedure for journalists with State bodies, contains no grounds limiting journalists' access. The author claimed that the refusal to grant her accreditation constituted a violation of her constitutional right to access information and a violation of the domestic law.

2.4 In her claim, the author also pointed out that the Rules of Accreditation for Journalists from the Mass Media to the House of Representatives of Belarus, issued by the President of the House, were contradictory. In particular, rule No. 10 states that the House of Representatives forwards accreditation requests to the security service of the President of the Republic of Belarus for clearance and to grant permission for access; rule No. 11 states that journalists who are not granted access may not be accredited; whereas rule No. 17 states that accredited journalists must obtain permission for access from the security service. The author submitted that the factual decision about whether to grant her accreditation was taken by the security service, which was not competent to take that decision according to the law. The refusal to grant her access and accreditation was thus unlawful, discriminatory and violated the interests of an independent press and the rights of the journalist. The author referred to article 14, paragraph 1, of the Covenant and requested the court to revoke the refusal to grant her accreditation.

2.5 On 13 February 2009, the Moscow District Court in Minsk refused to hear the case on the grounds that the author had no right to a judicial remedy, since her complaint fell outside the jurisdiction of the courts.

2.6 On an unspecified date, the author filed a private complaint before Minsk City Court against the District Court's refusal to hear the case. The author referred to article 112 of the Constitution, which establishes that the courts administer justice based on the provisions of the Constitution and the laws adopted in accordance with it. She also noted that the Law of 6 June 1996 on citizens' submissions and Presidential Decree No. 498 of 15 October 2007 establish a procedure on handling citizens' complaints, which includes judicial review. She also made reference to articles 2 and 14, paragraph 1, of the Covenant. On 26 March 2009, Minsk City Court rejected the author's complaint on the grounds that the relevant

legislation did not include a specific reference to the right to a judicial remedy in cases of denial of accreditation to the House of Representatives.

2.7 On an unspecified date, the author filed an appeal before the Supreme Court under the supervisory review procedure, which was rejected on 26 June 2009 on the grounds that the pertinent legislation did not include a specific reference to the right to a judicial remedy in cases of denial of accreditation. The author's subsequent attempts to appeal before the Supreme Court and the Constitutional Court were unsuccessful.

The complaint

3.1 The author claims that the refusal to grant her accreditation to the House of Representatives amounts to denial of access to information, and that the authorities have not justified the denial on the basis of the protection of the rights or reputation of other persons, nor on the basis of the protection of national security, public order, health or morals. She therefore claims that the denial violates her rights under articles 19 and 2, paragraph 3, of the Covenant.

3.2 The author also claims that the denial of the courts to hear her case constitutes a denial of justice, in violation of her rights under article 14, paragraph 1, of the Covenant.

3.3 The author further claims that all the other media representatives received accreditation to the House of Representatives and that she was refused it because her newspaper is the only independent publication, not owned by the State. She believes that the refusal is politically motivated and discriminatory, and that it violates her rights under article 26 of the Covenant.

3.4 She also claims that the refusal to hear her case before the courts was based on discriminatory grounds and thus constitutes a violation of article 26 of the Covenant.

State party's observations on admissibility

4.1 By note verbale of 6 January 2011, the State party recalled that it had repeatedly expressed its legitimate concerns to the Committee regarding the unjustified registration of individual communications. The majority of the concerns related to communications which had been submitted by individuals who had deliberately not exhausted all available remedies in the State party, which include filing an appeal with the Office of the Procurator-General against judgements that had taken effect, under the supervisory review procedure. The State party added that the present communication had been "registered in violation of the provisions of the Optional Protocol" and that there were therefore "no legal grounds for (its) consideration by the State party".

4.2 By letter of 19 April 2011, the Chairperson of the Committee informed the State party that it is implicit in article 4, paragraph 2, of the Optional Protocol to the Covenant that a State party must provide the Committee with all the information at its disposal. Therefore, the State party was requested to submit its observations on the admissibility and the merits of the present case. The Chairperson also informed the State party that, in the absence of further information, the Committee would proceed with the examination of the communication based on the information available to it.

4.3 On 30 September 2011, the State party was again invited to submit its observations on admissibility and merits.

4.4 On 5 October 2011, the State party submitted that it believed that there were no legal grounds for the consideration of the present communication, since it had been registered in violation of article 1 of the Optional Protocol. It maintained that all available domestic remedies had not been exhausted, as required by article 2 of the Optional Protocol, since no appeal for supervisory judicial review had been filed with Office of the Procurator-General.

4.5 On 25 October 2011, the State party was again invited to submit its observations on admissibility and merits. It was again informed that, in the absence of further information, the Committee would proceed with the examination of the communication based on the information available to it.

4.6 On 25 January 2012, the State party submitted with regard to the present communication and around 60 other communications that, when becoming a party to the Optional Protocol, it had recognized the competence of the Committee under article 1, but that recognition of competence was undertaken in conjunction with other provisions of the Optional Protocol, including those that established criteria regarding petitioners and the admissibility of their communications, in particular articles 2 and 5. The State party maintains that, under the Optional Protocol, State parties have no obligation regarding recognition of the Committee's rules of procedure and its interpretation of the provisions of the Optional Protocol, which "could only be efficient when done in accordance with the Vienna Convention on the Law on Treaties". It submits that, "in relation to the complaint procedure the States parties should be guided first and foremost by the provisions of the Optional Protocol," and that "references to the Committee's long-standing practice, methods of work, case law are not subject of the Optional Protocol". It also submits that "any communication registered in violation of the provisions of the Optional Protocol to the Covenant on Civil and Political Rights will be viewed by the State party as incompatible with the Protocol and will be rejected without comments on the admissibility or on the merits". The State party also maintains that decisions taken by the Committee on rejected communications will be considered by its authorities as "invalid".

Author's comments on the State party's observations

5.1 On 19 March 2012, the author submitted that, according to article 61 of the Constitution, after exhausting existing domestic remedies, in line with the international treaties ratified by the State party, a person has a right to submit complaints to international organizations in order to protect his/her rights and freedoms. The author quotes article 2, paragraph 3, of the Covenant and article 2 of the Optional Protocol, and points out that by becoming a party to the Optional Protocol to the Covenant, the State party has recognized the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by the State party of any of the rights set forth in the Covenant.²

5.2 The author submits that the obligation to exhaust domestic remedies is related to the subsidiary nature of international protection mechanisms which may be employed if a State party fails to protect a victim from the violation of his/her rights within its own system. Regarding the effectiveness of the domestic remedies, the author submits that an effective remedy is a procedure capable of settling in a binding nature disputes concerning violations of rights by courts or by State institutions and of providing a remedy (compensation). In that connection, the author notes that she has appealed the refusal of the Moscow District Court in Minsk to hear her case within cassation proceedings and under the supervisory review procedure. In the light of the Committee's jurisprudence in other cases against Belarus regarding the available domestic remedies in the State party, the author maintains that she has exhausted all available domestic remedies. She further notes that the supervisory review procedure is discretionary in nature and for that reason, cannot be considered as an effective remedy. She adds that the Committee has not concluded in its jurisprudence that the supervisory review procedure constitutes an effective remedy. The author also refers to a number of decisions of the European Court of Human Rights

² The author refers to article 1 of the Optional Protocol to the Covenant.

regarding other countries, and scholarly materials on the ineffectiveness of the supervisory review procedure.

5.3 The author also notes that the State party has not demonstrated that a prosecutor's protest motion submitted within the supervisory review procedure is indeed an effective remedy. In that connection, she notes that the State party is aware of many cases when a prosecutor's protest motion submitted within the supervisory review procedure has been rejected or dismissed by courts. She maintains that a prosecutor's protest motion submitted within supervisory review procedure does not guarantee the re-examination of a case, and consequently, that remedy cannot be considered effective.

5.4 In the light of the above, the author maintains that she has fulfilled all the admissibility requirements set out in the Optional Protocol to the Covenant before submitting the present communication to the Committee and that her case can be examined on the merits. She notes that the State party has not presented any facts demonstrating the contrary and has not substantiated its arguments.

Issues and proceedings before the Committee

State party's lack of cooperation

6.1 The Committee notes the State party's assertion that there are no legal grounds for the consideration of the authors' communication, insofar as it is registered in violation of the provisions of the Optional Protocol; that it has no obligations regarding recognition of the Committee's rules of procedure and regarding the Committee's interpretation of the provisions of the Optional Protocol; and that if a decision is taken by the Committee on the present communication, it will be considered "invalid" by the authorities of the State party.

6.2 The Committee recalls that under article 39, paragraph 2, of the Covenant, it is empowered to establish its own rules of procedure, which States parties have agreed to recognize. It further observes that, by adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (preamble and art. 1). Implicit in a State's adherence to the Optional Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination to forward its views to the State party and to the individual (art. 5, paras. 1 and 4). It is incompatible with those obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views.³ It is for the Committee to determine whether a communication should be registered. By failing to accept the competence of the Committee to determine whether a communication shall be registered and by declaring beforehand that it will not accept the determination of the Committee on the admissibility or the merits of that communication, the State party violates its obligations under article 1 of the Optional Protocol to the Covenant.⁴

³ See, inter alia, communication No. 869/1999, *Piandiong et al. v. the Philippines*, Views adopted on 19 October 2000, para. 5.1.

⁴ See, for example, communications No. 1226/2003, *Korneenko v. Belarus*, Views adopted on 20 July 2012, para. 8.2; No. 1948/2010, *Turchenyak et al. v. Belarus*, Views adopted on 24 July 2013, para. 5.2.

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether or not the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 The Committee notes the author's claims under article 19, read separately and in conjunction with article 2, paragraph 3, and article 14, paragraph 1, of the Covenant. It notes that the State party has challenged the admissibility of the communication for non-exhaustion of domestic remedies under article 5, paragraph 2 (b), of the Optional Protocol as the author has failed to request the Office of the Procurator-General to have her case considered under the supervisory review proceedings. The Committee recalls its jurisprudence, according to which a petition for supervisory review to a Prosecutor's Office, allowing for review of court decisions that have taken effect, does not constitute a remedy which has to be exhausted for the purposes of article 5, paragraph 2 (b), of the Optional Protocol.⁵ Accordingly, it considers that it is not precluded by article 5, paragraph 2 (b), of the Optional Protocol from examining that part of the communication.

7.4 The Committee further notes that the author claims that her rights under article 26 of the Covenant have been violated as she was refused accreditation by the House of Representatives because the accreditation request was submitted by an independent newspaper. The Committee observes that, according to the information available on file, the author was refused accreditation as she was not granted security clearance giving her access to the premises of the National Assembly. The Committee notes that no other reasons were provided by the national authorities. The Committee also notes that the author provided no further pertinent information, for example, names and numbers of accredited State-owned media, and other non-accredited privately owned media. It further notes that the newspaper at issue has been published in Belarus since 2000 and that it was re-issued a publishing certificate in 2010. In addition, the Committee observes that the editor-in-chief was informed by the House of Representatives on 23 January 2009 that he could submit a request for accreditation of another journalist from that newspaper. In addition, the Committee notes the author's claim that the refusal to hear her case before the courts was based on discriminatory grounds. In those circumstances and in the absence of any other pertinent information on file, the Committee considers that the present claim is not sufficiently substantiated for the purposes of admissibility as far as it relates to article 26 of the Covenant, and concludes that that part of the communication is inadmissible under article 2 of the Optional Protocol.

7.5 The Committee considers that the author's claims under articles 19 read alone and in conjunction with article 2, paragraph 3, and 14, paragraph 1, of the Covenant regarding the restriction of her freedom of expression and her access to court are sufficiently substantiated, for the purposes of admissibility, declares them admissible and proceeds to their examination on the merits.

⁵ Communication No. 1873/2009, *Alekseev v. the Russian Federation*, Views adopted on 25 October 2013, para. 8.4.

Consideration of merits

8.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5, paragraph 1, of the Optional Protocol.

8.2 The issue before the Committee is whether the refusal of the author's accreditation to the State party's National Assembly for the purpose of reporting on the work of the House of Representatives amounts to a violation of her right under article 19 of the Covenant, to seek, receive and impart information.

8.3 The Committee recalls that article 19, paragraph 2, taken together with article 25 of the Covenant, include a right whereby the media has access to information on public affairs. The free press and other media can therefore access information about the activities of elected bodies and their members and are able to comment on public issues without censorship or restraint and inform public opinion.⁶ Any restrictions imposed by the State party on the exercise of the rights protected under article 19, paragraph 2, must be provided by law; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict test of necessity and proportionality.⁷ The Committee recalls that a State party must demonstrate in specific and individualized fashion why the specific action taken was necessary and proportionate.⁸ With respect to accreditation schemes for journalists, the Committee recalls that such schemes are permissible only where necessary to provide journalists with privileged access to certain places and/or events. Such schemes shall be applied in a manner that is non-discriminatory and compatible with article 19 and other provisions of the Covenant, based on objective criteria and taking into account that journalism is a function shared by a wide range of actors.⁹ The relevant criteria for accreditation shall be specific, fair and reasonable, and their application shall be transparent.¹⁰

8.4 In the present case, the refusal to grant the author's accreditation to the State party's National Assembly, which would enable her, as a journalist, to access information and, thereafter, to impart it in order to inform the readers of the *Narodnaya Volya* newspaper of the work of the National Assembly, amounted to a restriction on the exercise of her right to freedom of expression. The Committee notes that the State party has submitted no observations on the merits of the present communication and has therefore sought neither to justify the refusal of accreditation as application of the law nor to identify which of the above-mentioned purposes are applicable, much less the necessity thereof in the particular case. The Committee also notes that, according to information on file, the author was denied accreditation because her security clearance had been refused by the security services, resulting in the fact that she did not have access to the Sovetskaya 11 administrative premises where the National Assembly is located. According to the available information on file, the authorities' refusal was based on the Law on the Press and Other Mass Media and the Rules of Accreditation for Journalists from the Mass Media to the House of Representatives of Belarus.

⁶ See communication No. 633/1995, *Gauthier v. Canada*, Views adopted on 5 May 1999, para. 13.4 and the Committee's general comment No. 34 (2011) on freedoms of opinion and expression, paras. 18 and 20. See also the Committee's general comment No. 25 (1996) on the right to participate in public affairs, voting rights and the right of equal access to public service, para. 25.

⁷ See communication No. 1022/2001, *Velichkin v. Belarus*, Views adopted on 20 October 2005, para. 7.3.

⁸ See communication No. 926/2000, *Shin v. Republic of Korea*, Views adopted 16 March 2004, para. 7.3. See also general comment No. 34 (note 6 above), para. 35.

⁹ See general comment No. 34 (note 6 above), para. 44.

¹⁰ See *Gauthier v. Canada* (note 6 above), para. 13.6.

8.5 The Committee has to consider whether those grounds are sufficiently precise to qualify the author's denial of accreditation as provided by law and necessary for the grounds set out in subparagraphs (a) and (b) of article 19, paragraph 3. The Committee notes the author's claim that article 42 of the Law on the Press and Other Mass Media, which provides for the accreditation of journalists, does not contain any grounds for denying accreditation, whereas rule No. 11 of the Rules of Accreditation for Journalists from the Mass Media to the House of Representatives of Belarus excludes accreditation if a journalist is refused access to the Sovetskaya 11 administrative complex. The Committee recalls that it is for the State party to demonstrate the legal basis for any restrictions imposed on freedom of expression.¹¹ For the purposes of article 19, paragraph 3, a norm must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.¹² A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution but must provide sufficient guidance to those charged with their execution to enable them to ascertain the basis for restricting the rights protected under article 19.¹³ In the present case, in the absence of any further information from the State party on the legal grounds for denying access to the premises of the Sovetskaya 11 administrative complex, the Committee concludes that the State party has failed to show for the purposes of article 19, paragraph 3, of the Covenant, that the refusal to grant accreditation to the author was based on the law, and, moreover, why it was necessary for respect of the rights or reputations of others, for the protection of national security or of public order (*ordre public*) or of public health or morals. The Committee, therefore, finds that the denial of accreditation of the author to the National Assembly constitutes a violation of article 19, paragraph 2, of the Covenant.

8.6 The Committee further observes that the national courts refused to examine the author's complaint concerning the denial of accreditation on the grounds that such complaints fall outside the jurisdiction of the courts. In that connection, the Committee notes that there is no possibility of recourse, either to the courts or to the National Assembly, to determine the legality of the author's exclusion or its necessity for the purposes spelled out in article 19 of the Covenant. The Committee recalls that, under article 2, paragraph 3, of the Covenant, States parties have undertaken to ensure that any person whose rights are violated shall have an effective remedy, and that any person claiming such a remedy shall have his/her right thereto determined by competent authorities. Accordingly, whenever a right recognized by the Covenant is affected by the action of a State agent, there must be a procedure established by the State allowing the person whose right has been affected to claim before a competent body that there has been a violation of his/her rights.¹⁴

8.7 In the light of the above and in the absence of any information from the State party as to the merits of the present communication, the Committee concludes that the author's rights under article 19, paragraph 2, read alone and in conjunction with article 2, paragraph 3, of the Covenant have been violated.

8.8 In the light of that conclusion, the Committee decides not to examine separately the author's remaining claims under article 14, paragraph 1, of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the

¹¹ See, for example, communication No. 1553/2007, *Korneenko and Milinkevich v. Belarus*, Views adopted on 20 March 2009, para. 8.3.

¹² See general comment No. 34 (note 6 above), para. 25.

¹³ *Ibid.*, para. 25.

¹⁴ See, for example, *Gauthier v. Canada* (note 6 above), para. 13.7.

facts before it disclose a violation by Belarus of article 19, paragraph 2, read alone and in conjunction with article 2, paragraph 3, of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including an independent review of the application to grant her accreditation and access to the State party's National Assembly in full respect of her rights under article 19, paragraph 2. The State party is also under an obligation to take steps to prevent similar violations in the future. To that end, the State party should review its legislation, particularly, the Rules of Accreditation for Journalists from the Mass Media to the House of Representatives of Belarus, to ensure their compatibility with article 19 of the Covenant.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views, and to have them widely disseminated in Belarusian and Russian in the State party.
